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No. 86-518

In The
Supreme Court of the United States
October Term, 1986

EVERGREEN TOWERS, INC.,
Petitioner,

vs.

CITY OF EAST ORANGE and
STATE OF NEW JERSEY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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COUNTERSTATEMENT OF THE CASE

INTRODUCTION

Petitioner files this application solely for delay. Petitioner has not paid one single dollar of real property taxes since part payment in 1980. (P7a) Final resolution of this matter was and has been interminably delayed as a result of numerous continuances, motion for rehearing, and delays in discovery, while petitioner continued to operate the building and collect rents from various tenants.

The only legitimate legal issue raised in this case is a facial attack on the New Jersey statutory scheme which requires taxpayers who desire to litigate their real property tax assessments to continue to pay their current tax liability as a condition of continuing the litigation, obtaining a refund with interest if they are eventually successful.

Petitioner's claim that it was unable to pay three-quarters of the real property taxes assessed for the tax year 1980 as a condition to obtaining tax assessment relief from the Essex County Board of Taxation is a complete and unconscionable sham. Petitioner was given the opportunity for an evidentiary hearing on this claim preceded by required discovery. It specifically failed and refused to comply with legitimate discovery demands, despite a court order requiring compliance, ultimately resulting in a denial of its motion for reconsideration. Moreover, petitioner's own factual allegations, which never became part of the trial court's record, demonstrate that petitioner did in fact have the ability to pay the disputed real property taxes.

Petitioner, by its actions herein, has effectively removed its 9-story office building from the real property

tax rolls for over five years. This is an excellent example of the reasons why the New Jersey State legislature enacted additional methods to enforce real property tax payments during a dispute over the tax assessments by relegating litigating taxpayers to refund suits. Petitioner's attack on this type of statutory method has long since been rejected by this Court.

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

The original assessment imposed on the property pursuant to a 1974 municipal-wide revaluation was 1.64 million dollars. (P37a)

In 1977, the property was assessed at $1,494,700 (not including a separately assessed parking lot, assessed at $22,800 which was consolidated in the 1980 assessment). (P37a) That assessment was reduced after litigation before the New Jersey Division of Tax Appeals, the forerunner to the Tax Court of New Jersey.

The 1978 and 1979 assessments were $1,412,800 (including the separately assessed parking lot) or $1,390,000 (excluding the separately assessed parking lot). (P39a-40a) These assessments were reduced by the automatic application of the New Jersey Freeze Act, *N.J.S.A.* 54:2-43 (now *N.J.S.A.* 51A:1-8) to the level established in the 1977 trial judgment.

In 1980, the New Jersey Freeze Act, by its terms, was no longer applicable and the tax assessor established an independent assessment of 1,500,000 dollars consistent with the assessment history of the subject property.

Petitioner filed an appeal to the Essex County Board of Taxation. Even though its three principals admittedly had the ability to advance the three quarters of the taxes due, (P7a, P66a), and even though available evidence indicated that petitioner itself had the ability to pay three-quarters of the property taxes due, it failed and refused to pay those taxes. Accordingly, respondent moved before the Essex County Board of Taxation to dismiss the appeal. The Essex County Board of Taxation, apparently recognizing the validity of respondent's position, granted a grace period for payment of the taxes. Inexplicably, the next action in the matter was the issuance of an Essex County Board of Taxation judgment reducing the property tax assessment.

Respondent sought review before the Tax Court of New Jersey. Petitioner continued to fail and refuse to pay the property taxes due.

At the trial level, the matter was subject to interminable delay. On or about April 14, 1982, respondent moved for summary judgment. On August 11, 1983, the trial judge granted the relief sought by respondent. On October 13, 1983, (Order dated November 9, 1983), the trial judge permitted a rehearing on condition that petitioner provide all relevant discovery regarding its claimed inability to pay the taxes. Petitioner failed to comply with discovery and its defenses were stricken on March 7, 1984. Petitioner's defenses were reinstated on condition that it answer several of the interrogatories, on August 2, 1984. Petitioner appeared on November 27, 1984, before the trial judge having failed to answer those interrogatories and its application for rehearing was finally denied.

The Superior Court of New Jersey, Appellate Division, has affirmed (P1a) The Supreme Court of New Jersey has denied petitioner's petition for certification. (P10a) Petitioner's writ of certiorari in the form of a brief, was filed and served on or after September 25, 1986.

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COUNTERSTATEMENT OF FACTUAL BACKGROUND

Many of petitioner's factual allegations are incomplete, incorrect, or misleading. None are supported by any competent evidence established at an evidentiary hearing because petitioner sabotaged any effort to create a competent record by blatantly refusing to engage in legitimate discovery. This self-inflicted failure now permits petitioner to make wild and unsubstantiated allegations.

Petitioner's recitation of assessments is irrelevant and incomplete. Petitioner refers only to the building assessment and not the land assessment. In New Jersey, total assessments must be divided into land and building. (*N.J.S.A.* 54:4-26). With respect to improved property, having both a land and improvement assessment, the land assessments are customarily left untouched and reductions are assessed against the improvement assessment for purposes of maintaining land assessment uniformity. Therefore, without a comparison of the total assessments, a comparison of building assessments is a clever, but misleading, technique.

Petitioner's claims as to its net income for 1980 is not only irrelevant but is offensive in light of petitioner's refusal to subject these claims to discovery and cross-

examination at trial. Petitioner refused to produce actual accounting documents such as financial statements, books and ledgers or income tax returns, as ordered by the trial judge, which might have substantiated these claims. (P5a-6a) Moreover, the issue, even as raised by petitioner, focuses on petitioner's ability to pay the taxes during late 1980. The alleged net income for one year provides no information as to reserves for taxes, ability to borrow the funds, equity in the property or past history of net income. Petitioner also refused to provide discovery on any of these issues. (P5a-6a)

Further, even petitioner's own figures (incompetent and unsubstantiated as they are) give the lie to its assertion of indigency. In order to preserve jurisdiction in the Essex County Board of Taxation, the property owner was required to pay approximately $35,000 in addition to the approximate $57,000 already paid in satisfaction of the first three quarters' real estate taxes (three-quarters of $123,000). Even on the basis of petitioner's own fictitious figures, this amount could easily have been paid. Certainly and admittedly, the principals of the corporation could have guaranteed any loans to pay this amount. (P66a) No plausible explanation for petitioner's failure to pay the real property taxes was ever offered in this case.

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SUMMARY OF ARGUMENT

1. Petitioner's due process claim must be rejected because the New Jersey statutory scheme implements the "pay now, litigate later" principle, long approved by this Court in the field of real property taxation. Taxpayers are provided full refunds with interest if they are successful, thereby satisfying Federal Constitutional requirements.

2. Petitioner's claim of inability to pay the tax is an unconscionable diversionary tactic as petitioner refused to subject that claim to the rigors of discovery and cross-examination preferring to assert unauthenticated and unsubstantiated figures.

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LEGAL ARGUMENT

POINT I.

NEW JERSEY'S STATUTORY SCHEME REQUIRING THAT ALL TAXPAYERS BE CURRENT TO THE EXTENT OF THREE QUARTERS OF REAL PROPERTY TAXES DUE AS A CONDITION TO PROCEEDING WITH REAL PROPERTY TAX LITIGATION COMPORTS WITH FEDERAL DUE PROCESS REQUIREMENTS.

N.J.S.A. 54:4-66 requires all real property taxpayers in New Jersey to make quarterly payments of taxes. (February 1, May, 1, August 1, and November 1). This statute is applicable to all taxpayers whether they file tax appeals or not. *N.J.S.A.* 54:3-27 further provides that a taxpayer may not be delinquent in payment of its first three quar-

ters taxes if it desires to pursue real property tax assessment reduction before the county boards of taxation. The statute does not impose "prepayment" but only that the taxpayer remain current in its payments otherwise normally due. The statute does not impose currency in payment as a condition to *filing* the appeal but merely as a condition to *hearing and relief*. The taxpayer may be granted an extension of time in which to pay the taxes up until the last day that the county board of taxation has jurisdiction over the matter. *New Jersey Administrative Code*, § 18: 12A-1.6(d); *Verden Realty Mgmt. Co. v. City of East Orange*, 5 *N.J. Tax* 637 (Tax Ct. 1983). If the municipality fails to move before the county board of taxation to enforce *N.J.S.A.* 54:3-27, its rights thereunder may be waived. See *LeCross Assoc. v. City Partners*, 168 *N.J. Super.* 96, 401 *A.*2d 1099 (App. Div. 1979) certif. den. 81 *N.J.* 294, 405 *A.*2d 838 (1979).

Legislation making tax payment a prerequisite to commencing and pursuing tax litigation has been uniformly approved by this Court. *Cheatham v. U.S.*, 92 *U.S.* 85, 89 (1976); *Dodge v. Osborn*, 240 *U.S.* 118, 122 (1969); *Flora v. U.S.*, 357 *U.S.* 63, 68 (1958) aff'd on reh 362 *U.S.* 145 (1960); *Phillips v. Commis. of Internal Revenue* 283 *U.S.* 589, 599 (1931); *Bob Jones Univ. v. Simon*, 416 *U.S.* 725 (1974).

This Court has consistently refused to interfere with a State taxation scheme which relegates a taxpayer to a refund suit, holding that such schemes are generally considered adequate legal remedies within the meaning of the Federal Tax Injunction Act. 28 *U.S.C.* § 1341. *Shelton v. Platt*, 139 *U.S.* 591 (1891) (State statute requiring taxpayer

to pay a license tax and to sue within 30 days after payment or be forever barred); *Matthews v. Rodgers,* 284 *U.S.* 521, 526 (1932); *Great Lakes Dredge & Dock Co. v. Huffman,* 319 *U.S.* 293, 300-301 (1943); *Rosewell v. LaSalle Nat'l Bank,* 450 *U.S.* 503 reh. den. 451 *U.S.* 1011 (1981); *California v. Grace Brethren Church,* 457 *U.S.* 393 (1982).

Rosewell, supra, is particularly relevant as it involved a challenge to a real property tax assessment scheme which relegated a real property taxpayer to refund litigation.

The lower Federal Courts concur. *DePauw Univ. v. Brunk,* 53 *F.*2d 647 (D. Ct. Mo. 1931); *Dist. of Columbia v. Berenter,* 466 *F.*2d 367 (D. Ct. Cir. 1972); *Blackhawk Mining Co., Inc. v. Andrus,* 711 *F.*2d 753 (6th Cir. 1983); *B&M Coal Corp. v. Office of Surface Mining Reclamation & Enforcement,* 699 *F.*2d 381 (7th Cir. 1983).

The New Jersey tax payment requirements expressed at *N.J.S.A.* 54:3-27 are less strict than customary statutes of limitation. This Court has consistently upheld reasonable statutes of limitations and other jurisdictional prerequisites to commencing litigation. *Wheeler v. Jackson,* 137 *U.S.* 245, 258 (1890); *Jones v. Union Guano Co., Inc.,* 264 *U.S.* 171 (1924). In analogous circumstances, this Court has further upheld other types of payment requirements, such as the payment of filing fees, as a condition to instituting litigation. *U.S. v. Kras,* 409 *U.S.* 434 (1973); *Ortwein v. Schwab,* 410 *U.S.* 656 (1973) reh. den. 411 *U.S.* 922 (1973).

The critical governmental interest in receiving timely payment of taxes was recognized by this Court more than a century ago.

> "[T]axes are the lifeblood of government, and their *prompt and certain availability* an imperious need. Time out of mind, therefore the sovereign has resorted to more drastic means of collection." *Bull v. United States,* 295 *U.S.* 247 (1935). (emphasis supplied)

In *Rosewell v. LaSalle Nat'l. Bank,* 450 *U.S.* at 527 (1981), this Court took notice of the recognized fact that real property taxes are the most important source of tax revenues for municipalities. These specific policies underlie *N.J.S.A.* 54:3-27 (See *LeCross Assoc. v. City Partners,* 168 *N.J. Super.* 96, 98-99, 401 *A.*2d 1099, 1100-1101, certif. den. 81 *N.J.* 294 (1979)).

The interests asserted by petitioner are nothing more than the desire to wrongfully withhold tax payments otherwise due the government to use for other purposes. All that petitioner could conceivably be deprived of is interest on its money which is refunded, if petitioner is successful, at a rate of 5%. *N.J.S.A.* 54:3-27.2.

Petitioner's suggested alternative, posting a surety bond, is no different than paying the taxes due. No competent facts indicate that petitioner was unable to satisfy this statute.

In this case, the trial court structured a remedy to address petitioner's claims. It provided for a hearing affording petitioner an opportunity to prove any claim of indigency provable, without requiring petitioner to pay any of the real property taxes due. Petitioner demonstrated its disdain for the opportunities afforded by the trial judge by brazenly and cavalierly failing and refusing to respond to discovery requests that went to the heart of the issue. Thus, as the New Jersey Appellate Division

found, petitioner "was given every opportunity for a hearing to prove that compliance with the statute would be financially burdensome and failed to abide by the requirements of the rules of court." (P9a).

This Court noted in *Boddie v. Connecticut,* 401 *U.S.* 371 (1971) that a litigant's due process rights require only an *opportunity* for a judicial-type hearing and that the opportunity can be lost or waived if the party seeking it "without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication. . ." [at 378].

Here, *N.J.S.A.* 54:3-27 serves an important and legitimate governmental interest and is therefore constitutional on its face. There are no competent facts to continue the inquiry into the statute's constitutionality as applied since petitioner squandered the opportunity afforded by the trial judge to make a legitimate record.

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CONCLUSION

Petitioner's application herein is simply the final step in a long series of delay tactics. As the conclusion of the tax year 1986 is approaching, the property which is the subject of this dispute, a 9-story modern office building, continues to be occupied by commercial tenants, but is failing to produce one single dollar of real property taxes for the municipality. It is therefore respectfully submitted that based upon principles expressed by this Court more than one hundred years ago and the egregious cir-

cumstances of this case, this application must be promptly denied.

Respectfully submitted,

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